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No. 92-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Petitioner,

v.

THE DOW CHEMICAL COMPANY and
VAN WATERS & ROGERS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 2

I. RESPONDENTS HAVE BEEN UNABLE TO SQUARE THE TENTH CIRCUIT'S IMPLIED PREEMPTION ANALYSIS WITH *CIPOLLONE*'S DIRECTIVE TO GIVE EXPRESS PREEMPTIVE PROVISIONS BOTH EXCLUSIVE AND NARROW EFFECT; MOREOVER, RESPONDENTS HAVE FAILED TO PROVIDE THIS COURT WITH ANY MEANINGFUL BASIS FOR GIVING THE TENTH CIRCUIT'S HOLDING OF IMPLIED PREEMPTION MORE, RATHER THAN LESS, DEFERENCE THAN WAS GIVEN TO THE ELEVENTH CIRCUIT'S NARROWER HOLDING OF PREEMPTION IN *PAPAS* 2

II. CONTRARY TO RESPONDENTS' CONTENTIONS, THERE IS A WIDESPREAD AND CONTINUING SPLIT OF AUTHORITY ON WHETHER AND TO WHAT EXTENT FIFRA PREEMPTS STATE COMMON-LAW TORT CLAIMS OF INADEQUATE LABELING OR FAILURE TO WARN 4

III. THIS COURT'S DECISIONS IN *CIPOLLONE* AND *MORTIER* DO NOT SUPPORT THE TENTH CIRCUIT'S BROAD HOLDING THAT FIFRA PREEMPTS STATE COMMON-LAW TORT CLAIMS OF INADEQUATE WARNING OR LABELING 7

IV. CONTRARY TO RESPONDENTS' CONTENTIONS, THE TENTH CIRCUIT'S EXTENSION OF THE CURRENT FIFRA'S PREEMPTIVE REACH TO BAR CLAIMS BASED ON PRE-1972 CONDUCT IS AN ESPECIALLY TROUBLING ASPECT OF THE HOLDING THAT WARRANTS REVIEW OR RECONSIDERATION 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: Page

Bradley v. School Bd. of City of Richmond, 416 U.S. 696 (1974) 9

Burke v. The Dow Chem. Co., No. CV 90-3344, 1992 U.S. Dist. LEXIS 10575 (E.D. N.Y. July 16, 1992) 5, 6

Ciba-Geigy Corp. v. Alter, 309 Ark. 426 (1992) 6

Cipollone v. Liggett Group, Inc., 60 U.S.L.W. 4703 (U.S. June 24, 1992) ..... *passim*

Davidson v. Velsicol Chem. Corp., No. 22464, 1992 Nev. LEXIS 123 (Nev. Aug. 12, 1992) 6

Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) 5, 6

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 5

National By-Products, Inc. v. Pope, No. 91-5665 (6th Cir. April 6, 1992) 5

Papas v. Upjohn Co., 926 F.2d 1019 (11th Cir. 1991), *cert. granted, judgment vacated, and case remanded sub nom. Papas v. Zoecon*, 60 U.S.L.W. 3878 (U.S. June 29, 1992) 2, 4, 5

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. ——, 115 L.Ed.2d 532 (1991) 2, 7

Worm v. American Cyanamid Co., No. 91-1749, 1992 U.S. App. LEXIS 14154 (4th Cir. June 19, 1992) 6

Federal Statutes:

Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973, Pub. L. No. 92-516 ..... 8, 9, 10

Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 61 Stat. 163 (1947), as amended, 7 U.S.C. §§ 136-136y ..... *passim*

United States Code:

7 U.S.C. § 136v(b) 3, 7, 8, 9

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PETITIONER'S REPLY BRIEF

There appears to be no dispute about the facts of this case or about the great national importance of the question of whether the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), as amended, preempts state common-law tort claims that are based on inadequate labeling of pesticide products or failure to warn about the harmful effects of such products. However, in their brief in opposition ("Opposition Brief"), respondents contend that review or reconsideration of the Tenth Circuit's decision below is nevertheless unwarranted, because (i) the Tenth Circuit's implied preemption analysis was consistent with the analytical framework set out in this Court's subsequent decision in *Cipollone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703 (U.S. June 24, 1992), *see* Opposition Brief at 8-13, (ii) there is no "divisive" conflict regarding

FIFRA preemption in the courts below, *see id.* at 13-17, (iii) the Tenth Circuit's holding on preemption is supported by this Court's opinions in *Cipollone* and *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. ——, 115 L. Ed. 2d 532 (1991), *see* Opposition Brief at 17-22, and (iv) the Tenth Circuit's application of the current FIFRA to preempt claims based on pre-1972 conduct was correct and, in any event, is only a matter of state law interpretation. *See id.* at 22-27.[1] In this reply brief, petitioner Arkansas-Platte & Gulf Partnership ("AP&G") shall address those contentions seriatim.

ARGUMENT

I. RESPONDENTS HAVE BEEN UNABLE TO SQUARE THE TENTH CIRCUIT'S IMPLIED PREEMPTION ANALYSIS WITH *CIPOLLONE*'S DIRECTIVE TO GIVE EXPRESS PREEMPTIVE PROVISIONS BOTH EXCLUSIVE AND NARROW EFFECT; MOREOVER, RESPONDENTS HAVE FAILED TO PROVIDE THIS COURT WITH ANY MEANINGFUL BASIS FOR GIVING THE TENTH CIRCUIT'S HOLDING OF IMPLIED PREEMPTION MORE, RATHER THAN LESS, DEFERENCE THAN WAS GIVEN TO THE ELEVENTH CIRCUIT'S NARROWER HOLDING OF PREEMPTION IN *PAPAS*.

In the Petition, AP&G argued that the Tenth Circuit's implied preemption analysis in the instant case, like the Eleventh Circuit's similar analysis in *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *cert. granted, judgment vacated, and case remanded sub nom. Papas v. Zoecon*, 60 U.S.L.W. 3878 (U.S. June 29, 1992), cannot be reconciled with this Court's directive in *Cipollone* that express preemptive provisions are to be given both exclusive and narrow effect. *See* Petition at 9. Respondents

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[1] *See also id.* at i ("Questions Presented") para. 2 (attempting to recharacterize the second question presented in the petition for a writ of certiorari (the "Petition") as a question that involves an issue of state law).

do not dispute AP&G's contention that the Tenth Circuit's implied preemption analysis would violate such a directive. Instead, they simply deny that this Court, in *Cipollone*, ever said such a thing.[2]

AP&G respectfully submits that, though there may have been some disagreement about the wisdom of the holding, all of this Court's members acknowledged in *Cipollone* that the Court was, in fact, holding that express preemption provisions are to be given exclusive and narrow effect.[3] Moreover, though respondents argue that such a reading of *Cipollone* "effectively and *sub silentio* overrules a number of significant decisions of this Court," *see* Opposition Brief at 10, and further argues that "the pre-emption analysis set forth in *Cipollone* . . . should be limited to express pre-emption cases concerning relatively non-complex statutes," *see id.* at 12, those contentions, if at all meritorious, would seem only to constitute additional reasons for giving this Court another opportunity to elaborate upon the preemption analysis set forth in *Cipollone*.

In addition to pointing out that the Tenth Circuit's implied preemption analysis conflicts with the analysis

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[2] *See, e.g.*, Opposition Brief at 10-11 & n.6 ("Petitioner's assertion that *Cipollone* directs that preemption provisions must be given a 'narrow effect' is clearly erroneous," and, "contrary to Petitioner's argument, the presence of pre-emptive language in 7 U.S.C. § 136v (b) did not restrict the Tenth Circuit to an express pre-emption analysis").

[3] *See, e.g.*, 60 U.S.L.W. at 4707 (Stevens, J., for the Court), 4711 (Blackmun, J., concurring in the Court's principles that "[w]e resort to principles of implied pre-emption . . . only when Congress has been silent with respect to pre-emption" and "[w]e do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language"), 4714-15 (Scalia, J., criticizing the Court's "two new" principles that "express pre-emption provisions must be given the narrowest possible construction" and "[o]nce there is an express pre-emption provision . . . all doctrines of implied pre-emption are eliminated").

subsequently set out in *Cipollone*, the Petition also suggested that, at a minimum, this Court should permit the Tenth Circuit the same opportunity given to the Eleventh Circuit in *Papas* to reconsider its judgment in light of *Cipollone*. *See* Petition at 9-11. In their Opposition Brief, respondents make no argument to suggest that the Tenth Circuit's holding on preemption is entitled to any greater deference than the Eleventh Circuit's holding in *Papas*.[4] For reasons set forth more fully in the Petition and elsewhere in this reply brief, AP&G continues to believe that the issues raised in this case warrant this Court's review; however, at a minimum, this Court should, consistent with its treatment of *Papas*, grant the Petition, summarily vacate the judgment below, and remand the case to the Tenth Circuit for further consideration in light of *Cipollone*.

II. CONTRARY TO RESPONDENTS' CONTENTIONS, THERE IS A WIDESPREAD AND CONTINUING SPLIT OF AUTHORITY ON WHETHER AND TO WHAT EXTENT FIFRA PREEMPTS STATE COMMON-LAW TORT CLAIMS OF INADEQUATE LABELING OR FAILURE TO WARN.

AP&G's Petition set out, in considerable detail, the split of authority on whether and to what extent FIFRA preempts state common-law tort claims of inadequate labeling or failure to warn. *See* Petition at 12-17. In their Opposition Brief, respondents contend that there is no "divisive" conflict on the issue, because the leading

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[4] Respondents do say, somewhat cryptically, that, "unlike the Petition and Brief in Opposition before this Court in *Papas* . . . Petitioner and Respondents have fully briefed the issue of the consistency of the Tenth Circuit's opinion in [this case] with this Court's most recent pronouncements." *See* Opposition Brief at 7 n.4. Respondents seem to be suggesting that this Court should treat the Petition and Opposition Brief as briefs on the merits, and should summarily affirm the Tenth Circuit's holding, based primarily upon respondents' misstatement of the Court's own preemption analysis in *Cipollone*. Needless to say, AP&G believes that the Tenth Circuit's decision warrants more searching review.

case against preemption, *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984), (i) was "rejected" or "constructively overruled" by this Court in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), *see* Opposition Brief at 7, 14, (ii) "stands in isolation to four other Courts of Appeal" that have found preemption by FIFRA, *see id.* at 14, 15-16, and (iii) has been followed in just "a few" district courts that had "a strong desire" to preserve remedies for injured plaintiffs. *See id.* at 16-17.

In reply, AP&G would note the following. First, as this Court well knows, *Ouellette* did not overrule or reject *Ferebee*. *Ferebee* was, in fact, cited with approval in Justice Bluckmun's opinion in *Cipollone*, *see* 60 U.S.L.W. at 4712, and, as Judge Jack Weinstein recently observed, Ferebee "remains a leading case" on the issue of FIFRA preemption. *See Burke v. The Dow Chem. Co.*, No. CV 90-3344, 1992 U.S. Dist. LEXIS 10575 (E.D. N.Y. July 16, 1992).[5]

Second, of the fourt federal circuit court opinions that have allegedly "followed *Ouellette* in clearly and explicitly rejecting both *Ferebee*'s 'choice of reaction' analysis and its holding of no pre-emption," *see* Opposition Brief at 15, one was vacated by this Court, *see Papas*, a second was a two-page, unpublished opinion that never mentioned FIFRA or preemption and that merely summarily affirmed a district court order granting summary judgment on grounds that included, in the alternative, FIFRA preemption, *see National By-Products, Inc. v. Pope*, No. 91-5665 (6th Cir. April 6, 1992), and a third followed neither *Ferebee* nor the Tenth Circuit's holding in the instant case, but instead took an intermediate position,

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[5] AP&G would additionally note that, of the eighteen post-*Ferebee* cases cited in the Petition that found no preemption of common-law claims by FIFRA, seventeen, including opinions by eleven different federal district court judges and one state court of last resort, were decided after *Ouellette*.

finding preemption only to the extent that the establishment or enforcement of a common-law duty "would impose a labeling requirement inconsistent with those established by FIFRA." *See Worm v. American Cyanamid Co.*, No. 91-1749, 1992 U.S. App. LEXIS 14154 (4th Cir. June 19, 1992). In sum, there are currently three federal circuit court opinions on this preemption issue—*Ferebee*, *Worm*, and the Tenth Circuit's opinion below. All three are in conflict with one another.

Third, the "few" district court decisions that have continued to find no preemption of common-law claims by FIFRA include a substantial majority of the district court decisions cited by the parties. *See, e.g.*, Petition at 15 nn.6, 7 & 8 and accompanying text. Respondents' suggestion that those "few" decisions have been unduly influenced by a "strong desire" to preserve remedies to injured plaintiffs does not merit comment.

Finally, AP&G would note that respondents have cited the most recent cases on FIFRA preemption, but have not discussed their significance. First, there is now a split in the state courts of last resort as well as in the federal circuit courts regarding FIFRA preemption. *Compare Davidson v. Velsicol Chem. Corp.*, No. 22464, 1992 Nev. LEXIS 123 (Nev. Aug. 12, 1992) (holding that FIFRA impliedly [sic] preempts state common-law tort claims of inadequate labeling) *with Ciba-Geigy Corp. v. Alter*, 309 Ark. 426 (1992) (finding no preemption). Second, further guidance from this Court, beyond *Cipollone*, may be needed to resolve the conflict on this FIFRA preemption issue. *Compare Burke* (applying the *Cipollone* analysis and finding a limited area of express preemption of claims involving EPA-approved labels, but refusing to find any implied preemption) *with Davidson* (finding *Cipollone* unhelpful, and proceeding to hold that FIFRA does not expressly preempt state tort claims, but does impliedly preempt them—a holding that the *Cipollone* analysis would seem to have foreclosed).

The widespread and continuing split of authority on this issue calls for resolution by this Court.

III. THIS COURT'S DECISIONS IN *CIPOLLONE* AND *MORTIER* DO NOT SUPPORT THE TENTH CIRCUIT'S BROAD HOLDING THAT FIFRA PREEMPTS STATE COMMON-LAW TORT CLAIMS OF INADEQUATE WARNING OR LABELING.

Respondents contend that this Court's decision in *Cipollone* supports the Tenth Circuit's holding that, even in cases involving pesticide labels that may never have complied with regulatory requirements or been approved by a government agency, and even in cases involving labels on products that were sold and distributed prior to the comprehensive revision of FIFRA and the introduction of preemptive statutory language regarding labeling, FIFRA preempts tort claims of inadequate warning or labeling. *See* Opposition Brief at 20-21. Respondents' argument, which consists of a simple observation that there is some similar language in the express preemption clauses of the current FIFRA statute and the Public Health Cigarette Smoking Act of 1969, is, for now, sufficiently dealt with in the Petition's discussion regarding FIFRA's preemptive reach under the standards of *Cipollone*. *See* Petition at 24-27.

Respondents also contend that this Court's decision in *Mortier* "strongly supports" a finding that claims of inadequate warning are preempted by FIFRA. Respondents quote dicta from *Mortier* that appears to acknowledge that 7 U.S.C. § 136v(b) was intended to have a preemptive effect on state regulation of labeling and packaging, and they conclude that "*Mortier* makes clear this Court's position on the issue of FIFRA pre-emption of pesticide labeling [sic]." *See* Opposition Brief at 18-19. Of course, AP&G has never denied that 7 U.S.C. § 136v(b) has some preemptive effect in the area of labeling and packaging. What AP&G denies, and what *Mortier* plainly did not suggest, is that the express preemptive language of 7

U.S.C. § 136v(b) was intended to preempt state common-law tort claims based on inadequate labeling or warning.

IV. CONTRARY TO RESPONDENTS' CONTENTIONS, THE TENTH CIRCUIT'S EXTENSION OF THE CURRENT FIFRA'S PREEMPTIVE REACH TO BAR CLAIMS BASED ON PRE-1972 CONDUCT IS AN ESPECIALLY TROUBLING ASPECT OF THE HOLDING THAT WARRANTS REVIEW OR RECONSIDERATION.

The Tenth Circuit's decision below extended the preemptive reach of the *current* FIFRA to bar even tort claims that are based on the inadequacy of labels on, or warnings relating to, pesticide products that were distributed and sold prior to the enactment of the 1972 FIFRA legislation and its express preemptive provision at 7 U.S.C. § 136v(b). In essence, the court gave retroactive effect to the 1972 legislation to immunize manufacturers from liability for earlier wrongful acts and omissions. In their Opposition Brief, respondents seek to shelter this most questionable aspect of the Tenth Circuit's holding from this Court's review or the Tenth Circuit's reconsideration upon remand.

First, respondents assert that this "so-called retroactivity issue" was not "addressed" in *Cipollone*. *See* Opposition Brief at 23. In fact, as was noted in the Petition, *see* Petition at 11, *Cipollone* consistently applied the federal statute in effect at the time of the allegedly tortious acts and omissions to determine whether later-accruing common-law tort claims based on those acts and omissions would be preempted; the correctness of that approach was undisputed.

Second, respondents assert that applying current rather than pre-1972 FIFRA was correct as a matter of "state law interpretation" because AP&G's claims did not accrue under state law until 1987. *See* Opposition Brief at 23-24. However, as was recognized in *Cipollone*, the date on which the claims accrued under state law (for purposes of, for example, statutes of limitation) is irrelevant; the

federal statute to be applied in the preemption analysis is the one that governed the manufacturers' behavior at the time of their allegedly tortious conduct. *See* Petition at 11 n.3.[6]

Third, respondents assert that the application of current rather than pre-1972 FIFRA is consistent with this Court's established authority, citing *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711 (1974). *See* Opposition Brief at 25. However, as is discussed in the Petition, *see* Petition at 11, 22-23, the dominant strand of this Court's decisions, including the decision in *Cipollone*, is to the contrary.

Fourth, respondents assert that, "contrary to petitioner's assertion, there is no split of authority on whether 7 U.S.C. § 136v(b) should apply." *See* Opposition Brief at 25. AP&G never said that there was such a split, though it did refer to "the confusion in the lower courts regarding the propriety of applying subsequent statutory amendments to prior conduct." *See* Petition at 22-23. That confusion is well illustrated by the Tenth Circuit's decision below.

Fifth, regarding AP&G's assertion that section 4(e) of the 1972 FIFRA legislation provides additional, express evidence that Congress intended that liability to third persons arising out of acts and omissions prior to the 1972 amendments would be governed by pre-1972 FIFRA, respondents speculate that "liability to any third person" in section 4(e) refers only to the government's obligation to indemnify pesticide owners for losses resulting from cancellation of the pesticide's registration. *See*

[6] Respondents' observation that AP&G's claims are based in part on the theory of strict liability, which was not recognized by the Colorado Supreme Court until after 1972, *see* Opposition Brief at 23 n.14, is also irrelevant. Judicial decisions, unlike statutes, generally operate retrospectively; there is nothing unfair, unusual, or inconsistent about applying post-1972 judicial decisions and pre-1972 statutory law to the claims in this case.

Opposition Brief at 26-27. However, respondents have provided no legislative history or other authority for that contention, or for any other contention that the words in section 4(e) of the 1972 legislation do not mean exactly what they say.

There is no basis for sheltering, from review or reconsideration, the Tenth Circuit's extension of the current FIFRA's preemptive reach to bar claims based on pre-1972 conduct.

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, this Court should grant the petition, summarily vacate or reverse the judgment, and remand the case for further consideration in light of this Court's decision in *Cipollone*.

Respectfully submitted,

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